

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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BAY STATE GAS COMPANY)	D.T.E. 02-73
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OPPOSITION OF BAY STATE GAS COMPANY
TO APPEAL OF HEARING OFFICER RULING BY LOCAL 273,
UTILITY WORKERS UNION OF AMERICA, AFL-CIO

I. INTRODUCTION

Bay State Gas Company (“Bay State” or “the Company”) hereby provides its opposition to the appeal of Local 273, Utility Workers Union of America, AFL-CIO (“Local 273”) filed on December 20, 2002 (“Local 273 Appeal”). The Local 273 Appeal relates to the December 11, 2002 ruling by the Hearing Officer (the “Hearing Officer Ruling”) with respect to the petition to intervene filed by Local 273. In that Ruling, the Hearing Officer found that Local 273 was not substantially and specifically affected by the outcome in this proceeding, and therefore, was not granted intervenor status. However, the Hearing Officer Ruling granted Local 273 limited participant status in the proceeding and (1) directed the Company to respond to Local 273’s information requests, (2) allowed Local 273’s information request responses to be moved into the record as exhibits, (3) permitted Local 273 to submit cross-examination questions to the Bench for consideration at the evidentiary hearing, and (4) Local 273 was permitted to submit a brief at the close of evidentiary hearings.

For the reasons set forth below, Bay State requests that the Commission reject Local 273's appeal because it fails to establish how the Hearing Officer Ruling regarding Local 273's intervention status was in error or an abuse of discretion.¹

II. ARGUMENT

The Local 273 Appeal should be denied because the Hearing Officer properly denied it full-party status in this proceeding. Department precedent is clear that only those petitioners that are substantially and specifically affected by a proceeding may be granted the status of an intervening party. G.L. c. 30A, § 10(4); see also Boston Edison Company/Commonwealth Electric Company, D.T.E. 98-118/119/126, Interlocutory Order (March 19, 1999); Boston Edison Company, D.P.U. 96-23, Interlocutory Order on Appeal by Cablevision Systems Corporation of its Intervention Status and on Petition of the New England Cable Television Association, Inc. for Leave to Intervene Late (September 8, 1997), *affirmed on appeal*, Cablevision Systems Corporation v. Department of Public Utilities, 428 Mass. 436 (1998), Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 45, cert. denied, 439 U.S. 921 (1978), Newton v. Department of Public Utilities, 339 Mass. 535, 543, n. 1 (1959). The Hearing Officer properly denied party status as an intervenor to Local 273 based on the fact it has not shown, either prior to the Hearing Officer Ruling, or in the Local 273 Appeal,² how it is substantially and specifically affected by the outcome in this proceeding.

¹ While Bay State addresses the Local 273 Appeal in Section II, below, the Company believes that the Appeal is moot given that the evidentiary hearing has been held and briefs filed in the case.

² The Local 273 Appeal should be judged based only on its original pleading for intervention and not on arguments raised for the first time in its appeal. See Boston Edison Company/Commonwealth Electric Company, D.T.E. 98-118/119/126, at 10 (Interlocutory Order, March 19, 1999) (shortcomings of an initial petition cannot be corrected on appeal).

In its Appeal, Local 273 continues to argue that a decline in jobs due to alleged financial difficulties of Bay State's parent company³ and prior participation in Department proceedings justifies its full participation in this proceeding (Local 273 Appeal at 1, 2, 4-13). The Hearing Officer already has considered those arguments and rejected them in the Hearing Officer Ruling. The Hearing Officer properly rejected those arguments in her ruling, since Bay State's proposed refinancing of \$50 million of long-term debt -- the only issue presented in this docket, has no bearing on those issues. The Hearing Officer clearly has the discretion to deny Local 273's full participation in the interest of promoting administrative efficiency,⁴ particularly where its interests can be represented more than adequately by the Attorney General.⁵ See, e.g., Nantucket Electric Company, D.P.U. 93-137, at 3 (1994), citing New England Telephone and Telegraph Company, D.P.U. 93-125, at 5 (1993) and New England Telephone and Telegraph Company, D.P.U. 91-30, at 2 (1991); see also Massachusetts Electric Company, D.P.U. 95-40, at 5 (Interlocutory Order on Appeal of Hearing Officer Ruling on the Petition to Intervene of Conservation Law Foundation).

Indeed, the Attorney General stated on the record that it has and continues to work with Local 273 in protecting and representing its interests (Tr. at 29). In its Appeal, Local 273 admits that its discovery request responses formed the basis for many of the cross-examination questions of the

³ Although not at issue in this proceeding, the Company's ratepayers have been the beneficiaries of a rate freeze that was implemented as a result of the NiSource merger and will continue to 2004. See, D.T.E. 98-31. Further, the Company's witness, Mr. Rea, testified to recent improvements in the Company's financial outlook. See, e.g., Tr. at 38. Local 273 has shown no established link between the number of its employees and the Company's financial condition. Finally, as discussed in Bay State's initial brief, under the Company's preferred 10-year note at current rates, there would be a net annual savings of roughly \$257,000 in interest expense as compared to previous levels. See, Tr. at 18.

⁴ The Hearing Officer is also authorized to consider how a prospective intervenor's participation will affect the administrative efficiency of a proceeding. Here, Local 273 has demonstrated that its participation has undermined the administrative efficiency of the proceeding, as evidenced by the two requests for delay submitted in advance of the evidentiary hearing as well as the instant appeal. The negative impact on administrative efficiency of Local 273's participation is further evidenced by the extraneous arguments contained in its Initial Brief.

Attorney General (Local 273 Appeal at 7). In fact, during the hearing, Local 273 consulted with the Assistant Attorney General (“AAG”) assigned to the case during the AAG’s cross-examination (Tr. at 29). Finally, there was no evidence to suggest that the Attorney General would not actively and thoroughly litigate the merits of Bay State’s financing request, and in fact, the Attorney General did take an active role in the case. Local 273 has offered no valid reason in any of its pleadings why the Attorney General could not adequately represent its interests in this proceeding.

Local 273 has not established the necessary link between this specific proceeding, which involves refinancing of long-term debt for general utility purposes, and how that financing would impact the Company’s union employees. The general standard employed by the Department is whether the proposed financing is consistent with the public interest and whether the proposed financing would adversely impact the Company’s capital structure. See, G.L. c. 164, §§ 14, 15, 16. This standard of review has no connection with the level of union employees. Bay State reiterates that the generalized claims that financing arrangements impact union employees is wholly insufficient to demonstrate that Local 273 is substantially and specifically affected by the proceeding.

Finally, Local 273 again discusses its and other unions’ participation in other Department proceedings, and argues that as a result of such prior intervention grants and the principle of “reasoned consistency,” Local 273 is entitled to intervene in the proceeding (Local 273 Appeal, at 8-13). This argument should be rejected by the Department.

The Department’s regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding. 220 C.M.R. § 1.03(1)(b); see also G.L. c. 30A, § 10. In interpreting this standard, the Department has broad discretion in determining whether to

⁵ The Attorney General filed his notice of intervention, as of right, pursuant to G.L. c. 12, § 11E.

allow participation, and the extent of participation, in Department proceedings. Attorney General v. Department of Public Utilities, 390 Mass. 208, 216 (1983); Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad but not unlimited discretion), cert. denied, 439 U.S. 921 (1978).

Local 273's argument simply ignores the fact that a petitioner must demonstrate in each and every instance how it is substantially and specifically affected by the specific proceeding in which it seeks to participate. A grant of intervention status in a total of three other proceedings over a roughly decade long period cited by Local 273 does not and cannot establish a "right" for its participation in any and all future proceedings. Local 273 must establish how it is affected by each proceeding and in this case has simply failed to do so. See, also, Cablevision v. Department of Telecommunications and Energy, 702 NE2d 799 (Mass 1998)(upholding denial of intervenor status in DTE proceeding and noting full party status granted to appellant in other proceedings).

Contrary to Local 273 claims of "entitlement" the Attorney General is the only party with a statutory right to intervene in a Department proceeding. All other potential intervenors must show that they meet the Department's intervention standards *each* time they request to intervene in a proceeding. In each instance, the Department must, in its broad discretion, rule on those petitions. Indeed, the Supreme Judicial Court ("SJC") has held that full intervention in earlier proceedings does not automatically require the Department to grant full intervention status in a later proceeding. Stanley U. Robinson v. Department of Public Utilities, 416 Mass. 668, 673 (December 1993). In the same case, the SJC determined that the individual denied intervenor status could adequately raise his issues as a

limited participant. Id. Similarly, in this proceeding, the Hearing Officer Ruling provided a procedure that adequately allowed Local 273 to raise its issues as a limited participant.⁶

III. CONCLUSION

Wherefore, Bay State Gas Company respectfully requests that the Department reject the December 20, 2002 appeal of the Hearing Officer Ruling submitted by Local 273.

Respectfully submitted,

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⁶ In fact, the rights granted to Local 273 as a limited participant, including issuance of discovery which was entered into evidence and the opportunity to submit questions to the bench, far exceed those rights typically granted to limited participants.